No. 97-374

Supreme Court, U.S.
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IN THE
Supreme Court of the United States
OCTOBER TERM, 1996

ERNESTO D. SIGMON, *et al.*,

Petitioners,

vs.

SOUTHWEST AIRLINES CO.,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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September 29,1997

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit properly affirmed the District Court's dismissal of Petitioners' state-law claims, because:

   A. those claims are expressly preempted by 26 U.S.C. § 7422, which provides that this tax-refund action "may be maintained only against the United States" and/or

   B. those claims are impliedly preempted by 26 U.S.C. § 7501, which provides that monies collected as taxes by private tax collectors are held in trust for the United States?

2. Whether the Fifth Circuit properly affirmed the District Court's dismissal of Petitioners' federal claim under 26 U.S.C. § 6415(c), because:

   A. 26 U.S.C. § 6415(c), which applies only to "overcollection[s] of . . . tax" resulting from mechanical or clerical errors, is inapplicable to the allegedly illegal collections underlying this action and/or

   B. 26 U.S.C. § 6415(c) provides no private right of action?

PARTIES TO THE PROCEEDING

Petitioners Ernesto D. Sigmon and William Gregory Hassler were Plaintiffs-Appellants in the Court of Appeals. Respondent Southwest Airlines Co. was Defendant-Appellee in the Court of Appeals. All of the parties to the proceedings below are parties in this Court.

CORPORATE DISCLOSURE STATEMENT

Respondent has no parent or subsidiary companies.

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For the reasons stated below, Respondents respectfully urge the Court to deny the petition for a writ of certiorari.

STATEMENT OF THE CASE

1. Statement of Facts.

Until Congress and the President unexpectedly allowed it to expire on December 31, 1995, 26 U.S.C. § 4261 imposed a ten percent (10%) excise tax on airline tickets. 26 U.S.C. § 4261. Before it expired, Section 4261 required airlines to collect a 10% excise tax on airline tickets and to remit the taxes so collected to the IRS. *See* 26 U.S.C. §§ 4261, 4291, 6302, 7501.

Congress first enacted the air-passenger excise tax more than four decades ago and extended the tax each time it was due to expire. Although Congress often waited until the eleventh hour to extend the tax, Congress never before failed to do so.[1] Throughout 1995, therefore, the airlines and the IRS once again expected Congress to extend the tax, which generated billions of dollars in tax revenues in recent years. Indeed, in November 1995, the House and Senate passed legislation that would have extended the tax for several years. Because that legislation also contained a controversial provision concerning Medicare and Welfare, however, the President vetoed the bill on December 6, 1995, and the tax expired at midnight on December 31, 1995.[2]

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[1]In 1963, for example, when the tax was due to expire on July 1, Congress extended it on June 29. Pub. L. No. 88-52, 77 Stat. 72 (1963). In 1964, when the tax once again was due to expire on July 1, Congress extended it on June 20. Pub. L. No. 88-348, 78 Stat. 237 (1964). In 1987, when the tax was due to expire on December 31, Congress extended it on December 30, with only one day to spare. Pub. L. No. 100-223, 101 Stat. 1532 (1987). More recently, Congress postponed the expiration from December 31, 1990, to December 31, 1995, by legislation that became law on November 5, 1990, ***after*** the adjournment *sine die* of the 101st Congress. Pub. L. No. 101-508, 104 Stat. 1388, 1432 (1990).

[2]On August 20, 1996, President Clinton signed legislation temporarily reenacting the tax for the remainder of 1996. *See* Pub. L.

Throughout 1995, Southwest reasonably believed that Congress would once again timely extend the tax or, failing that, reenact it retrospectively. Pet. App. at A2 n.1, E1-E2. Thus, Southwest, like other airlines, continued throughout 1995 to collect the excise tax on advance-purchase tickets for 1996 travel. *Id.*[3] Pursuant to its longstanding practice and in accordance with 26 U.S.C. §§ 6302 & 7501 and 26 C.F.R. § 40.6302(c)-3, Southwest then timely remitted all such excise taxes to the IRS. *See* Deposition of Rhonda Heatly ("Heatly Depo.") at 55-56, 86-87 (R2:64-65, 95-96).[4]

No. 104-188, § 1609(b), 110 Stat. 1755, 1841 (1996). After that legislation expired on December 31, 1996, Congress enacted similar temporary legislation in February 1997. *See* Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5 (1997). Recognizing the tremendous difficulty posed by last-minute collection of the tax on tickets already sold, Congress exempted from the 1996 tax travel on tickets purchased prior to its effective date, August 27, 1996, regardless of the date of travel. *Id.* § 1609(i). In the 1997 legislation, Congress went even further to avoid difficulty, expressly providing that the 1997 tax is applicable not only to tickets purchased for travel prior to the September 30, 1997, expiration date, but also to tickets purchased for travel after September 30, 1997, if purchased prior to that date. *See* Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5 (1997).

[3]Given the airlines' practice of issuing advance-purchase tickets months before departure, especially for holiday travel, failing to collect the tax throughout 1995 on tickets sold for 1996 travel could have caused substantial hardship. If Congress and the President had extended the tax before its expiration on December 31, 1995, an airline's failure to collect the tax at the time of sale would have required the airline to collect the tax ***at its departure gates***, as passengers attempted to board airplanes to return home from holiday travel. As Congress recognized in its 1996 and 1997 legislation reenacting the tax, the impact of such last-minute tax collections on the national air-traffic system and on families whose travel budgets had been exhausted would have been horrendous. *See* Pub. L. No. 104-188, § 1609(i), 110 Stat. 1755, 1844 (1996) (exempting from Section 4261 as reenacted effective August 27, 1996, travel on tickets paid for on or before August 26, 1996); *see also* Pub. L. No. 105-2, § 2(b)(1), 111 Stat. 4, 5, (1997) (providing that tax imposed by 4261 is applicable not only to transportation beginning prior to September 30, 1997, but also to "amounts paid during such period for transportation beginning after such period").

[4]Southwest believes that its payments to the IRS are irrelevant to

Despite such full and timely remittance to the IRS, Southwest also has voluntarily refunded directly to its customers all monies it collected in January 1996 as excise taxes and thousands of dollars it collected in 1995 on tickets used for travel in 1996. *Id.* at 49, 62-64, 67-72 & Exhibit C (R2:58, 71-73, 76-81, 123-46).

2. Course of Proceedings and Disposition Below.

Petitioners filed this action in state court in Dallas, Texas, suing on behalf of all persons who purchased airline tickets from Southwest for travel occurring after December 31, 1995, and alleging that the ticket prices such passengers paid illegally included the 10% excise tax previously required by 26 U.S.C. § 4261(a). Southwest timely removed the action to the United States District Court for the Northern District of Texas, invoking federal-question jurisdiction under 28 U.S.C. §§ 1331, 1340 & 1367. Shortly thereafter, Southwest filed a motion to dismiss, arguing, *inter alia,* that Petitioners' purported state-law claims were preempted by 26 U.S.C. § 7422, which provides that actions to recover monies alleged to have been collected

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the question whether Petitioners may maintain this action. *See Kaucky v. Southwest Airlines Co.*, 109 F.3d 349, 352 (7th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (holding: "It makes no difference whether [Southwest] is still holding the money it erroneously collected or has passed it on to the IRS. The principal [the IRS] is bound by the agent's [Southwest's] act. The IRS has plenty of remedies against its collection agents who fail to remit taxes that they collect. *See* 26 U.S.C. § 6672(a)."); *see also Sigmon v. Southwest Airlines Co.*, No. 3-96CV0393-H, Transcript of Proceedings Before the Honorable Barefoot Sanders, United States District Judge, at 29 (N.D. Tex. May 23, 1996) (R3:29) (holding that "[w]hether [Southwest] paid over the proper amount to the revenue service is really not the issue"), *aff'd*, 110 F.3d 1200 (5th Cir. 1997) (Pet. App. at A1-A16), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997). Nevertheless, the record is crystal clear that Southwest timely remitted to the IRS on the schedule imposed by 26 C.F.R. § 40.6302(c)-3 an amount equal to its total liability under 26 U.S.C. § 6302 for the monies Southwest collected as excise taxes in 1995, including the monies Southwest collected in 1995 as excise taxes on travel in 1996. *See* Heatly Depo. at 55-56, 86-87 (R2:64-65, 95-96).

illegally as federal taxes "may be maintained only against the United States."

Petitioners responded to Southwest's motion by seeking leave to file an amended complaint asserting a federal claim directly under 26 U.S.C. § 6415(c) and alleging that Southwest had failed to remit to the IRS the monies it had collected in 1995 as excise taxes on travel occurring in 1996. Petitioners argued that their new allegation that Southwest failed to remit to the IRS the monies it had collected in 1995 as excise taxes on travel occurring in 1996 raised an issue of fact precluding dismissal of their state-law claims under 26 U.S.C. § 7422 and that 26 U.S.C. § 6415(c) created an exception to Congress' mandate in Section 7422 that actions to recover monies alleged to have been collected illegally as federal taxes "may be maintained only against the United States."

After the District Court granted Petitioners leave to file their amended complaint, Southwest moved to convert its motion to dismiss into one for summary judgment and for leave to file summary-judgment evidence that Southwest had timely remitted to the IRS on the schedule imposed by 26 C.F.R. § 40.6302(c)-3 an amount equal to its total liability under 26 U.S.C. § 6302 for the monies Southwest collected as excise taxes in 1995, including the monies Southwest collected in 1995 as excise taxes on travel occurring in 1996. The District Court granted that motion and accepted summary-judgment evidence on the question whether Southwest had timely remitted the disputed funds to the IRS.

On May 23, 1996, the District Court granted summary judgment in favor of Southwest. Pet. App. at B1-B3; R3:26-30. The court concluded, *inter alia*, that Petitioners' state-law claims were barred by 26 U.S.C. § 7422 and that 26 U.S.C. § 6415(c) provided Petitioners no private right of action. R3:26-30. In reaching that decision, the court held that Petitioners' allegation that Southwest had not timely remitted the disputed funds to the IRS was immaterial. *Id.*

On April 28, 1997, the Fifth Circuit affirmed the District Court's summary judgment in favor of Southwest, holding that Petitioners' state-law claims were barred by 26 U.S.C. § 7422 and that 26 U.S.C. § 6415(c), even if applicable, gave Petitioners no private right of action. Pet. App. at A1-A16.

REASONS TO DENY THE WRIT

1. THE LOWER COURTS ARE IN COMPLETE AGREEMENT CONCERNING THE ISSUES PRESENTED BY THIS CASE.

This is one of four cases in which a federal court has recently dismissed claims seeking recovery of monies alleged to have been illegally collected as excise taxes on tickets sold in 1995 for air travel in 1996, after the expiration of 26 U.S.C. § 4261 on December 31, 1995. *See Brennan v. Southwest Airlines Co.*, No. C 96-1841-VRW, Transcript of Proceedings Before the Honorable Vaughn R. Walker, United States District Judge, at 22-25 (N.D. Cal. Sept. 6, 1996) [hereinafter, "*Brennan*, Transcript at __"], *appeal docketed*, No. 96-17053 (9th Cir. Nov. 6, 1996); *Lehman v. USAir Group, Inc.*, 930 F. Supp. 912, 914-16 (S.D.N.Y. 1996); *Sigmon v. Southwest Airlines Co.*, No. 3-96CV0393-H, Transcript of Proceedings Before the Honorable Barefoot Sanders, United States District Judge, at 26-30 (N.D. Tex. May 23, 1996) (R3:26-30) [hereinafter, "*Sigmon*, Transcript at __"], *aff'd*, 110 F.3d 1200 (5th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997) (No. 97-374); *Kaucky v. Southwest Airlines Co.*, 1996 WL 267875 (N.D. Ill. May 17, 1996), *aff'd*, 109 F.3d 349 (7th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97-347). The fully briefed motion to dismiss a fifth case, the *Eisenman* case in the District of New Jersey, is likely to be granted soon. *See Eisenman v. Continental Airlines, Inc.*, ___ F. Supp. ___, ___, 1997 WL 432032, *12 (D.N.J. July 23, 1997) (reversing magistrate's decision to remand passenger's tax-refund action against Continental Airlines to state court

and suggesting the propriety of granting Continental's motion to dismiss under 26 U.S.C. § 7422).

In each of the four dismissed cases, the District Court followed the reasoning of the leading case applying 26 U.S.C. § 7422 to actions against private tax collectors, *DuPont Glore Forgan Inc. v. American Tel. & Tel. Co. (AT&T)*, 428 F. Supp. 1297 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978), and held that actions against airlines to recover amounts alleged to have been illegally collected as excise taxes on 1996 travel are barred by 26 U.S.C. § 7422, which provides that actions to recover monies alleged to have been collected illegally as federal taxes "may be maintained only against the United States." *See Sigmon*, Transcript at 26-30 (R3:26-30); *see also Brennan*, Transcript at 22-25; *Lehman*, 930 F. Supp. at 914-16; *Kaucky*, 1996 WL 267875, *2-4. In two of the four cases, this case out of the Northern District of Texas and the *Kaucky* case out of the Northern District of Illinois, the Fifth and Seventh Circuits have unanimously affirmed the reasoning uniformly applied in the District Courts. *See Sigmon v. Southwest Airlines Co.*, 110 F.3d 1200 (5th Cir. 1997) (Pet. App. at A1-A16), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. Aug. 26, 1997) (No. 97-374); *Kaucky v. Southwest Airlines Co.*, 109 F.3d 349 (7th Cir. 1997), *pet. for cert. filed*, 66 U.S.L.W. 3171 (U.S. July 14, 1997) (No. 97-347).[5]

Nothing in any of these decisions of the lower federal courts suggests a need for this Court's guidance on the issues presented by this case. Rather, these decisions show that the lower courts are in complete agreement that 26 U.S.C. § 7422 bars state-law claims against airlines for

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[5] *See also, e.g., Burda v. M. Ecker Co.*, 954 F.2d 434, 439 (7th Cir. 1992); *Columbia Marine Servs., Inc. v. Reffet Ltd.*, 861 F.2d 18, 22 (2d Cir. 1988); *Bright v. Bechtel Petroleum, Inc.*, 780 F.2d 766, 768-770 (9th Cir. 1986); *Meggs v. Best*, 561 F. Supp. 1229, 1230 (S.D. Ga. 1983); *DuPont Glore Forgan Inc. v. American Telephone & Telegraph Co. (AT&T)*, 428 F. Supp. 1297 (S.D.N.Y. 1977), *aff'd*, 578 F.2d 1367 (2d Cir.), *cert. denied*, 439 U.S. 970 (1978); *Econ, Inc. v. Illinois Bell Tel. Co.*, 351 F. Supp. 1087, 1089 (N.D. Ill. 1972).

the recovery of monies alleged to have been illegally collected as excise taxes and that 26 U.S.C. § 6415(c) provides passengers no federal cause of action to recover such monies. Thus, the current state of the law as it has developed in the lower courts clearly does not justify an exercise of this Court's jurisdiction to secure uniformity of judgments.

Moreover, other opportunities to address the issues presented by this case are likely, as there are two more cases in the pipeline. The dismissal of the *Brennan* case in the Northern District of California is pending on appeal before the Ninth Circuit,[6] and an appeal of the *Eisenman* case to the Third Circuit is expected.[7] In the event that the Ninth Circuit in *Brennan* or the Third Circuit in *Eisenman* reaches a result that is at odds with those reached by the Fifth Circuit in this case and the Seventh Circuit in *Kaucky*, review in this Court might be appropriate to resolve the resulting conflict among the circuits. Because no such conflict has yet arisen, however, and the putative plaintiff class alleged in this case is subsumed within the plaintiff class alleged in *Brennan*, denying the Petition in this case would properly conserve the Court's scarce resources for use on a more appropriate day without causing even the slighest risk of injustice to the class Petitioners seek to represent.

2. THE FIFTH CIRCUIT PROPERLY AFFIRMED THE DISMISSAL OF PETITIONERS' CLAIMS.

Even if this case were the Court's sole opportunity to review the issues presented by the Petition, denying the writ still would be appropriate, because the Fifth Circuit clearly was correct to affirm the District Court's dismissal of Petitioners' claims. Petitioners' state-law claims against Southwest are expressly and impliedly preempted by the Internal Revenue Code, and the statute underlying

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[6]Argument of the *Brennan* case is scheduled for November 7, 1997.

[7]The *Lehman* plaintiffs did not appeal.

Petitioners' federal claim, 26 U.S.C. § 6415(c), neither applies to this case nor provides a private right of action. Thus, even if this were the only case in the pipeline, which it is not,[8] and even if this Court were concerned primarily with the correction of errors in particular cases, which it is not,[9] denying the Petition still would be appropriate.

A. The Internal Revenue Code Preempts Petitioners' State-Law Claims.

Contrary to Petitioners' assertions, their state-law claims fall within the preemptive reach of 26 U.S.C. § 7422, and *Enochs v. Williams Packing & Navigation Co.* cannot save those claims from dismissal. Further, Petitioners' state-law claims also are impliedly preempted by 26 U.S.C. § 7501, which provides that monies collected as taxes by private tax collectors are held in trust for the United States. Thus, the Fifth Circuit properly affirmed the District Court's dismissal of Petitioners' state-law claims.

i. 26 U.S.C. § 7422 Expressly Preempts Petitioners' State-Law Claims.

Nothing would bar Petitioners from ***requesting*** a refund of erroneously collected excise taxes from Southwest, and nothing would bar Southwest from ***voluntarily*** providing such a refund and seeking reimbursement from the IRS. Indeed, Southwest had voluntarily provided more than a thousand such refunds long before this lawsuit was filed. *See supra* at 3.

On the other hand, a passenger who seeks to ***compel*** a refund through a lawsuit must bring his or her action against the United States; he or she may not judicially compel such a refund from Southwest or from any other non-governmental tax collector. Under 26 U.S.C. § 7422(f)(1),

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[8] *See supra* at 7.

[9] *See* The Honorable Fred M. Vinson, Chief Justice of the United States, Work of the Federal Courts: An Address before the American Bar Association, Sept. 7, 1949, *in* 69 S. Ct. v, vi (1949).

"[m]oney collected in error by a lawful agent, public or private, of the Internal Revenue Service can be recovered ***only*** from the government, because a claim or suit to collect such money is a claim or suit for a tax refund." *Kaucky*, 109 F.3d at 353 (emphasis added); *see also* Pet. App. at A7.

a. Petitioners' State-Law Claims Fall Within the Scope of 26 U.S.C. § 7422.

The plain language of 26 U.S.C. § 7422(f)(1) provides that a suit to recover any amount alleged to have been erroneously or illegally collected as an internal revenue tax "may be maintained only against the United States . . . ." 26 U.S.C.S. § 7422(f)(1) (Lawyers' Co-op. 1995).[10] Following that plain language, the lower federal courts have unanimously concluded that section 7422 bars lawsuits brought against airlines to recover monies collected as excise taxes on 1996 travel. *See* Pet. App. at A7-A10; *Kaucky*, 109 F.3d at 351-53; *Eisenman*, 1997 WL 432032, *11; *Brennan*, Transcript at 22-25; *Lehman*, 930 F. Supp. at 914-16. All of the lower courts have held that the exclusive avenue to recover monies alleged to have been illegally collected by airlines as federal excise taxes on 1996 travel is an action against the United States pursuant to 26 U.S.C. § 7422. *See* Pet. App. at A7-A15; *Kaucky*, 109 F.3d at 351-53; *Eisenman*,

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[10]Section 7422(f)(1) provides: "A suit or proceeding referred to in subsection (a) [of Section 7422] may be maintained only against the United States and not against any officer or employee of the United States (or former officer or employee) or his personal representative." 26 U.S.C.S. § 7422(f)(1) (Lawyers' Co-op. 1995). Section 7422(a), to which Section 7422(f)(1) refers, provides: "No suit or proceeding shall be maintained in any court for the recovery of any internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . until a claim for refund or credit has been duly filed with the Secretary, according to the provisions of law in that regard, and the regulations of the Secretary established in pursuance thereof." 26 U.S.C. § 7422(a) (Lawyers' Co-op. 1995). Thus, read in context, Section 7422(f)(1) provides that a suit or proceeding for the recovery of monies alleged to have been erroneously or illegally collected as an internal revenue tax "may be maintained only against the United States . . . ." 26 U.S.C.S. § 7422(f)(1) (Lawyers' Co-op. 1995).

1997 WL 432032, *11; *Brennan*, Transcript at 22-25; *Lehman*, 930 F. Supp. at 914-16.[11]

In this case, as in *Kaucky*, *Lehman*, and *Brennan*, the plaintiffs have sought to recover monies alleged to have been erroneously or illegally collected as federal excise taxes by a lawful agent of the IRS. *See* R1:98-105. Thus, the Fifth Circuit clearly was correct to affirm the District Court's dismissal of Petitioners' claims pursuant to Section 7422, which expressly preempts state-law claims for federal tax refunds. Pet. App. at A10 ("The exclusive remedy provided by the Internal Revenue Code [§ 7422] . . . preempts . . . state-law claims against a private entity."); *Kaucky*, 109 F.3d at 351 (holding that Section 7422 completely preempts state-law claims for tax refunds); *Lehman*, 930 F. Supp. at 916 (holding that Section 7422 barred state-law claims against Continental and USAir to recover monies alleged to have been illegally collected as excise taxes on 1996 travel, reasoning that "Section 7422 provides that the exclusive remedy for a tax refund is an action against the United States" and that passengers' "state law claims against the airlines [were] expressly pre-empted by § 7422"); *Burda v. M. Ecker* Co., 1990 WL 17075 at *8 (N.D. Ill. Feb. 6, 1990)

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[11]This reasoning is buoyed by the late Judge Weinfeld's seminal study of Section 7422 in the *AT&T* case. *See AT&T*, 428 F. Supp. at 1301 (reasoning that "an overall view of the tax collection and refund provisions of the [Internal Revenue] Code, and of the mandated role of non-governmental collecting agents . . . shows that aggrieved taxpayers . . . ***must*** bring their suit against the government") (emphasis added); *id.* at 1302 ("[T]he language of section 7422 is unambiguous in requiring that a suit for the recovery of 'erroneously or illegally' overpaid taxes may be brought ***only*** against the United States.") (emphasis added). Like Judge Posner in *Kaucky*, Judge Weinfeld concluded in *AT&T* "that section 7422(f) means precisely what it says, and . . . plaintiffs may maintain a tax refund claim ***only*** against the government and not against collecting agents." *Id.* at 1303 (emphasis added); *see also Meggs*, 561 F. Supp. at 1230 (United States -- not private collector of plaintiff's income tax -- was proper defendant for tax-refund suit); *Econ, Inc.*, 351 F. Supp. at 1089 (dismissing refund suit against statutory collector of excise tax and noting that United States would be real party in interest if IRS rejected plaintiff's administrative claim).

(holding that "the purported state claim pled by the plaintiff [was] completely pre-empted" by 26 U.S.C. § 7422), *aff'd in relevant part*, 954 F.2d 434, 439 (7th Cir. 1992).[12]

b. The "Colorable Basis" Test Is Inapplicable.

The Fifth Circuit also was correct to affirm Judge Sanders' conclusion that the "colorable basis" rationale articulated in *Enochs v. Williams Packing & Navigation Co.*, 370 U.S. 1 (1962), cannot save this case from dismissal. Although Southwest clearly had probable cause to believe in late 1995 and early 1996 that the excise tax imposed by 26 U.S.C. § 4261 would be extended or reenacted to cover travel occurring on or after January 1, 1996, *see supra* at 1-3, and thus had a "colorable basis" for the challenged collections, *Kaucky*, 109 F.3d at 352; Pet. App. at A10; *Eisenman*, 1997 WL 432032, *7, *Enochs*' "colorable basis" test is inapplicable to cases brought to recover monies erroneously collected as federal taxes.[13]

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[12]The plain language of Section 7422 applies to all claims, however denominated or pleaded, that seek "recovery of ***any*** internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of ***any*** sum alleged to have been . . . in ***any*** manner wrongfully collected" as a federal tax. 26 U.S.C.S. § 7422(a) (Lawyers' Co-op. 1995) (emphasis added). Thus, Petitioners merely beg the question when they insist that this is not a "tax refund suit" within the preemptive reach of Section 7422 because no "tax" was applicable to their tickets. In virtually every tax-refund case, the plaintiff asserts that the challenged collection was partially or wholly invalid and that the amount collected was not due as a lawful "tax." *See, e.g., AT&T*, 428 F. Supp. at 1302. If construed not to apply to such cases, Section 7422 would become a dead letter. *See Kaucky*, 109 F.3d at 351 (holding that "the literal sense" is not "the right sense" in which to interpret the phrase "tax refund suit"); *see also* Pet. App. A8 (same, quoting *Kaucky*).

[13]*Enochs* was an action brought in 1957 to enjoin the collection of past due social security and unemployment taxes. The District Court granted the injunction, and the Supreme Court, relying on 26 U.S.C. § 7421(a), reversed. In reaching its decision, the *Enochs* Court reconciled its holding with the Court's much-criticized decision in *Miller v. Standard Nut Margarine Co.*, 284 U.S. 498 (1932), by observing in

First, the "colorable basis" test addresses an irrelevant issue. The rationale for enjoining future tax collections where the collecting entity has no "colorable basis" for its proposed collection is obvious: such an injunction would enable the taxpayer to keep his money in his pocket and save both the taxpayer and the Government the costs of processing a tax-refund claim. Although the same could be said for an injunction against any improper collection, even one for which a "colorable basis" existed, the balance between protecting taxpayers and keeping the courts out of the taxation business tips in favor of an injunction only where it is clear that there is no arguable basis for the proposed collection and thus no danger that an injunction would improperly interfere with Congress' comprehensive administrative scheme for collecting and, if necessary, refunding taxes. If, and only if, there is no "colorable basis" for a proposed collection, the policy of protecting taxpayers and the national economy from the costs of processing refund claims outweighs the policy of avoiding judicial interference with Congress' comprehensive taxing mechanism. In that circumstance only, it makes sense for a court to intercede early and enjoin an obviously unlawful collection that, in the long run, would merely impose needless collection and refund costs.

Where collection of an allegedly improper tax has already occurred, the balance never tips in favor of early judicial intervention. Once an allegedly erroneous or illegal

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dictum that an injunction against the collection of future taxes might be appropriate notwithstanding 26 U.S.C. § 7421(a) if, based on the information available to the Government at the time of suit, it were obvious that the Government could not prevail in a subsequent tax-refund suit ***and*** if equity jurisdiction otherwise were to exist. As the Court observed in *Bob Jones University v. Simon*, 416 U.S. 725, 744-45 (1974), the *Enochs* Court undertook "to rehabilitate [26 U.S.C. § 7421] following [the] debilitating departure[] from its explicit language" via the injunction granted in *Miller*. Thus, Petitioners' insistence at pages 8-14 of the Petition that the Fifth Circuit erred by failing to read *Enochs* to require judicial intervention in the administration of tax refunds is meritless.

collection has occurred, no judicial remedy can save the taxpayer or the national economy from the expense of seeking a refund. Thus, where the allegedly improper collection has already occurred, the reason for allowing injunctions of future collections for which there is no "colorable basis" -- economic efficiency -- provides no justification for interfering with Congress' comprehensive scheme for managing refund claims. In such a circumstance, the taxpayer and the national economy necessarily will incur the cost of processing a refund claim. Moreover, they will incur that cost regardless of the egregiousness of the alleged mistake in collecting the tax in the first place. Thus, where, as here, the allegedly improper collection of taxes has already occurred, the Enochs' "colorable basis" test is irrelevant.

Second, the "colorable basis" test is unnecessary. Underlying that test is a latent concern for the Government's potential overzealous collection of taxes, the historical roots of which are deeply rooted in American political thought. Fortunately, that concern does not arise where, as here, a private tax collector could not -- and did not -- benefit from overcollection. Private tax collectors are bound by law, on pain of criminal sanctions, to pay over to the IRS twice monthly all of the excise taxes they collect. *See* 26 U.S.C. §§ 6302, 7201, 7202; 26 C.F.R. § 40.6302(c)-3. Thus, there is little danger that private tax collectors will become overzealous in their collection duties. Moreover, even if a private tax collector were to become too aggressive, an adequate remedy at law (an administration claim to the IRS, followed -- if necessary -- by a civil action against the Government) would be available. Where private tax collectors are involved, therefore, the "colorable basis" test is as unnecessary as it is irrelevant.

Third, the "colorable basis" test unduly complicates the disposition of tax-refund cases against collecting agents by involving courts in unwarranted case-by-case line drawing. To achieve the efficiency goals of Section 7422, district courts must be able to determine its applicability via a

motion to dismiss disposed of before the burdens of class-action discovery extort a settlement from the beleaguered defendant collecting agent. The district court must be able to determine whether Section 7422 bars suit against the collecting agent without first allowing discovery concerning the alleged egregiousness of the challenged collection or the mental processes or motives of the agent in making the challenged collection. In short, the district court must be able to determine the applicability of Section 7422 from the face of a well pleaded complaint and the pages of the Internal Revenue Code.

Fortunately, the plain language of Section 7422 supplies an appropriate test. By its express terms, Section 7422 bars all claims, however denominated or pleaded, that seek "recovery of ***any*** internal revenue tax alleged to have been erroneously or illegally assessed or collected . . . or of ***any*** sum alleged to have been . . . in ***any*** manner wrongfully collected" as a federal tax. 26 U.S.C.S. § 7422(a) (Lawyers' Co-op. 1995) (emphasis added). Under this plain language, a court presented with a motion to dismiss under Section 7422 should simply determine whether the suit seeks "recovery of ***any internal revenue tax*** alleged to have been erroneously or illegally assessed or collected . . . ." To do so, the court should compare the allegations of the complaint to the pages of the Internal Revenue Code and ask whether the Code imposed on some or all of the defendant's transactions with its customers an "internal revenue tax" of the sort underlying the plaintiffs' suit. Where, as here, the plaintiffs challenge an allegedly illegal collection of an actual "internal revenue tax" that was applicable to some, though not all, of the defendant's transactions with its customers, the court should dismiss the suit under Section 7422, without any consideration of the presence or absence of a "colorable basis" for collecting the tax from the plaintiffs.[14]

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[14]Here, the statute books plainly reveal that 26 U.S.C. § 4261 imposed on air-passenger tickets an excise tax of the sort Southwest is

Finally, Petitioners' "colorable basis" argument proves too much. If the lack of a "colorable basis" for a particular collection were sufficient to justify ignoring the bar erected by the plain language of Section 7422(f), the lack of a "colorable basis" should also be sufficient to justify ignoring the exhaustion requirement of Section 7422(a) in actions against the Government. Because the *Enochs* Court clearly did not intend that result, it is not surprising that "[t]he *Enochs* exception . . . has never been applied to allow a taxpayer to sue a private tax collector for the refund of erroneously collected taxes." Pet. App. at A9.

ii. 26 U.S.C. § 7501 Impliedly Pre-empts Petitioners' State-Law Claims.

Although the Fifth Circuit's ruling regarding 26 U.S.C. § 7422 made it unnecessary for the Court of Appeals to

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accused of illegally collecting from Petitioners. Throughout 1995, that tax applied to some but not all of Southwest's transactions with its customers. In particular, it applied to purchases of tickets sold in 1995 for travel in 1995 but not to purchases of tickets sold in 1995 for travel in 1996. Under Section 4261, a customer who purchased two tickets on November 15, 1995 -- one for travel that day and another for a separate trip sixty days later -- clearly had to pay the tax on at least one of those two tickets. Thus, applying the test embodied in the plain language of Section 7422 properly produces a dismissal of Petitioners' claims in this lawsuit for recovery of monies alleged to have been illegally or erroneously collected as excise taxes under Section 4261.

In contrast, no provision of the Internal Revenue Code has ever imposed Petitioners' hypothetical "carry-on luggage tax" (*see* Petition at 10; Pet. App. at A8) on any ticket sold by Southwest. Thus, application of the test embodied in the plain language of Section 7422 would not produce a dismissal of Petitioners' hypothetical action brought by a passenger alleging that she had been improperly charged a "carry-on luggage tax." Nor would the application of the plain language of Section 7422 require dismissal of the "con man" case hypothesized in *Kaucky* (*see* 109 F.3d at 352), as the Internal Revenue Code has never imposed any tax on any of the con man's transactions with his victims.

In short, the plain language of Section 7422 properly distinguishes this case from those that should be allowed to go forward, and it does so without involving district courts in wasteful, case-by-case line drawing concerning the alleged egregiousness of challenged collections.

analyze Petitioners' state-law claims in light of any other provision of the Internal Revenue Code, those claims also conflict with -- and, thus, are impliedly pre-empted by -- 26 U.S.C. § 7501, which provides that monies collected as taxes by private tax collectors are held in trust for the United States -- not for taxpayers. *See* 26 U.S.C. § 7501 (providing that amounts withheld or collected as federal taxes by private tax collectors "shall be held to be a special fund in trust for the United States"); *see also Begier v. Internal Revenue Service*, 496 U.S. 53 (1990) (private tax collector need not segregate monies it collects as taxes or pay them to the IRS for those funds to constitute taxes held in trust exclusively for the benefit of the United States).

Further, Petitioners' state-law claims conflict with abundant authority holding that, in its role as excise-tax collector, Southwest acts not as the agent of taxpayers but as the agent of the United States. *See* Pet. App. at A7 ("Southwest acts as the government's agent in collecting airline ticket excise taxes."); *Kaucky*, 109 F.3d at 351 (same); *Eisenman*, 1997 WL 432032, *7 (in collecting excise taxes, "Continental acted as an agent of the IRS"); *AT&T*, 428 F. Supp. at 1306 ("The duty to collect [excise taxes] was imposed upon [non-governmental collection agents such as Southwest] by statute -- enforceable, if necessary, by criminal liability -- ***for the convenience of the United States***. . . . In . . . collecting the tax and paying it over to the government [such collection agents] ***act merely as agents for the United States***.") (emphasis added); *see also Meggs*, 561 F. Supp. at 1230 (noting that, in withholding payroll taxes from employee's wages, employer was acting as "agent of the government"); *Econ*, 351 F. Supp. at 1089 (holding that the real party in interest and the only proper defendant in an action to recover excise taxes alleged to have been erroneously or illegally collected is the United States).

Thus, Petitioners' state-law claims are not only ***expressly*** pre-empted by 26 U.S.C. § 7422, *see* Pet. App. at A10; *Kaucky*, 109 F.3d at 351-53; *Lehman*, 930 F. Supp. at 916, but also ***impliedly*** pre-empted by 26 U.S.C. § 7501,

which provides that Southwest, as the agent of the United States, holds monies collected as taxes in trust for the Government rather than for the taxpayers. *See Freightliner Corp. v. Myrick*, 514 U.S. 280, 115 S. Ct. 1483, 1487 (1995) (implied pre-emption occurs where applying state law would conflict with federal law).

B. Petitioners' Federal Claims Also Fail as a Matter of Law.

Like Petitioners' state-law claims, their federal claims under 26 U.S.C. § 6415(c) also fail as a matter of law. First, Section 6415(c) applies only to over-collections of lawful taxes caused by mechanical or clerical errors. Section 6415(c) is irrelevant where, as here, taxpayers seek recovery of monies alleged to have been erroneously collected without legal authority. Second, even if Section 6415(c) were applicable, it would not assist Petitioners, because it provides no private right of action. Thus, the Fifth Circuit properly affirmed the dismissal of Petitioners' federal claims under Section 6415(c).

i. 26 U.S.C. § 6415(c) Is Inapplicable.

As Judge Weinfeld correctly concluded some twenty years ago in the *AT&T* case, Section 6415(c) was not designed, as Petitioners suggest, simply to address a situation in which several claimants complain of the same improper collection of a small amount of money. *See AT&T*, 428 F. Supp. at 1304-05 & nn. 30-34. Although the efficacy of allowing informal refunds under Section 6415(c) may be more apparent when a multiplicity of small refund claims arise from the same mechanical or clerical mistake in calculating the amount of tax due, Section 6415(c) was intended to deal with improper collections of a particular ***type*** rather than improper collections of a particular ***size*** or ***frequency***.

In particular, Section 6415(c) was intended to deal with overcollections of lawful taxes occurring through mechanical errors and clerical mistakes rather than erroneous

collections arising from faulty interpretations or applications of the tax code. As demonstrated *supra* at 8-15, Section 7422, which requires the participation of the United States, provides the ***exclusive*** remedy for taxpayers who complain that federal law did not authorize the challenged collection. *AT&T*, 428 F. Supp. at 1305 ("Treasury regulations first promulgated in 1932, when the communications [excise] tax was enacted in its present form, and still applicable today, make it clear that a credit may be taken [under Section 6415] ***only*** when the overcollection was due to a 'clerical or mechanical error.' In ***all*** other cases, the regular refund procedure [established by Section 7422] must be followed.") (emphasis added). Section 6415(c), which does not contemplate participation by the United States, addresses only claims by taxpayers who assert that, through mechanical or clerical error (e.g., a misplaced decimal point), a lawful tax was overcollected. *See id.* at 1305 & nn. 32, 34 (quoting 26 C.F.R. § 301.6415(c) (1976) for the proposition that Section 6415(c) applies only "in cases where the overpayment was the result of a clerical or mechanical error" and quoting the predecessor of 26 C.F.R. § 301.6415(c) (1976), Treas. Reg. 43, Art. 65, 66 (1921), for the proposition that the predecessor to Section 6415(c) similarly applied only "to cases where, as the result of some clerical or mechanical error, an excess amount has been collected or paid" and that, "[i]n all cases where tax has been collected and such collections are alleged to be *illegal or erroneous*[,] it will be necessary for the person so paying the tax to file claim for refund.") (emphasis in original); *see also* Pet. App. at A11 ("Section 6415(c) on its face is limited to 'overcollection' of excise taxes, which has historically been distinguished from 'illegal' or 'erroneous' collection under Section 7422."); *Lehman*, 930 F. Supp. at 915 (holding that, "at most," Section 6415(c) "allows a claim for mathematical and technical errors, not for the general interpretation of a class of claims"). *Cf. Kaucky*, 109 F.3d at 353 (noting that Section 6415(c) "may be limited to errors in computation").

That the IRS might view the governing tax law to be sufficiently clear in a particular instance that the United States need not participate in a specific refund proceeding does not mean, as Petitioners suggest, that such a case should be labeled as one involving only clerical or mechanical errors subject to private disposition under 26 U.S.C. § 6415(c). What matters is that the alleged error is one of law rather than one of arithmetic. Pet. App. at A11-A12; *Lehman*, 930 F. Supp. at 915; *AT&T*, 428 F. Supp. at 915. Where, as here, the alleged error is one of law, the refund claim falls within a class of claims that Congress has said must be presented to the IRS in accordance with the procedures established by 26 U.S.C. § 7422, even if, in a particular case, the Government would prefer informal resolution under Section 6415(c). Where, as here, the alleged error is one of law, the tax collector ***may*** make refunds to customers if it so chooses, but it cannot be compelled to make such refunds, and its decision to do so voluntarily clearly cannot bind the United States in the event that the Government ultimately takes the view that the challenged collections were proper. Thus, the Government's interest in a particular refund claim, which can be determined only on a costly and time-consuming case-by-case basis, is irrelevant to the question whether a claim should proceed under the strict procedures of 26 U.S.C. § 7422 or under the more informal mechanism envisioned by 26 U.S.C. § 6415(c).

Also irrelevant is Petitioners' insistence that equity requires that Section 6415(c) govern this case. As demonstrated above, Section 6415(c) was enacted solely to allow private tax collectors to remedy clerical or mechanical errors in the collection of lawful taxes. Pet. App. at A11-A12; *Lehman*, 930 F. Supp. at 915; *AT&T*, 428 F. Supp. at 1304-05 & nn. 30-34. While Petitioners labor mightily to convince the Court that this particular case, because of the potential number of claimants, could be more efficiently resolved by the District Court under Section 6415(c) than by the IRS under Section 7422, they provide no analytical basis

for their contention that this case is of a type that Congress intended to be governed by Section 6415(c) rather than by Section 7422. Without such an analytical basis, Petitioners' argument is merely an invitation to rewrite the law.[15]

ii. 26 U.S.C. § 6415(c) Provides No Private Right of Action.

Even if Section 6415(c) were interpreted to impose a mandatory duty on Southwest to refund to Petitioners the excise taxes Southwest collected regarding 1996 travel, Petitioners would have no private right of action against Southwest under Section 6415(c).

In *Cort v. Ash*, 422 U.S. 66 (1975), this Court directed the lower courts to consider four factors in determining whether to recognize an implied right of action under a federal statute:

a) Is this plaintiff one of the class for whose "especial" benefit the statute was enacted? In other words, does the statute create a federal right in favor of the plaintiff?
b) Is there any indication of legislative intent, explicit or implicit, either to create such a remedy or to deny one?
c) Is it consistent with the underlying purposes of the legislative scheme to imply such a remedy for the plaintiff?

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[15]Even if Petitioners' argument were to make ***analytical*** sense, their suggestion that refund claims can be efficiently resolved through class-action litigation under Section 6415(c) still would make no ***practical*** sense. The expenses that members of the putative class would encounter in prosecuting administrative claims with the IRS would be dwarfed by the costs attending judicial management of such claims through the class-action device. Drafting, printing, and mailing individual class notice would easily cost ten times as much as the stamps required to mail class members' administrative claims to the IRS. Further, even if no jury trials were required, drafting, printing, and mailing claim forms to class members would waste tremendous resources, as the IRS already has an adequate form, as well as personnel and computers to process claims.

d) Is the cause of action one traditionally relegated to state law, or would it otherwise be inappropriate to infer a cause of action based solely on federal law?

422 U.S. at 78; *see also Mehrig v. KFC Western, Inc.*, 116 S. Ct. 1251, 1256 (1996); *Thompson v. Thompson*, 484 U.S. 174, 179, 108 S. Ct. 513, 516 (1988); *Merrill-Lynch Pierce, Fenner & Smith, P.C. v. Curran*, 456 U.S. 353, 374-78 (1981); *Middlesex Cty. Sewer. Auth. v. National Sea Clammers Ass'n*, 453 U.S. 11, 15 (1981); *Transamerica Mortgage Advisors, Inc. v. Lewis*, 444 U.S. 11, 15-16, 23-34 (1979); *Touche Ross & Co. v. Redington*, 442 U.S. 560, 568 (1979); *Cannon v. University of Chicago*, 441 U.S. 677, 690 (1979). As the Fifth Circuit correctly concluded, the application of these criteria in this case compels the conclusion that, even if Section 6415(c) were applicable to the collections challenged in this case, it would provide Petitioners' no private right of action against Southwest.[16]

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[16]Petitioners' assertion at pages 24-25 of the Petition that the Fifth Circuit's application of a presumption against implying private causes of action under federal statutes, *see* Pet. App. at A13, conflicts with this Court's decisions in *Cort* and its progeny is meritless. As the Court recognized in *Merrill Lynch*, the four-part *Cort* analsis was a marked departure from the Court's prior rule that "congressional silence or ambiguity was an insufficient reason for the denial of a remedy for a member of the class a statute was enacted to protect." 456 U.S. at 377, 102 S. Ct. at 1838. Thus, in *Middlesex County Sewerage Authority v. National Sea Clammers Association*, the Court held that, "[i]n the absence of strong indicia of a contrary congressional intent, [courts] are ***compelled*** to conclude that Congress provided precisely the remedies that it considered appropriate" and no more. 453 U.S at 15, 101 S. Ct. at 2623 (emphasis added). The Fifth Circuit's conclusion that *Cort* makes congressional ambiguity and silence cut against Petitioners and that Petitioners therefore bear a "relatively heavy burden of demonstrating that Congress affirmatively contemplated private enforcement when it passed" Section 6415(c), Pet. App. at A13, is perfectly consistent with this Court's holdings concerning implied rights of action. *See Cort*, 422 U.S. at 82-83 (relying on the lack of any suggestion in the legislative history concerning private causes of action as strong support for denying the claim); *see also Touche Ross*, 442 U.S. at 571 (where the statutes and legislative history are silent on the question of a private remedy,

a. Section 6415(c) Grants No Special Rights to Taxpayers.

Under the first *Cort* factor, courts ask whether the plaintiff belongs to an identifiable class of persons upon whom the statute has conferred a substantive right. *See Cannon* , 441 U.S. at 690. To determine when such specific rights arise, courts look to the "right- or duty-creating language of the statute," which "has generally been the most accurate indicator of the propriety of implication of a cause of action." *Id.* at 690 n.13.

Nothing in Section 6415(c) or Section 7422 creates a federal right in favor of Petitioners. Rather, as Judge Weinfeld concluded in *AT&T*, those provisions of the tax code are designed to increase administrative efficiency and reduce the Government's burden of collecting and, if necessary, refunding federal taxes. *AT&T*, 428 F. Supp. at 1305 (Section 6415(c) "is intended merely to simplify the procedures for adjustment of minor errors in tax collection, and not to carve out sub silentio an exception to the orderly structure of tax litigation by allowing persons seeking to litigate major and disputed questions of tax law to bypass the normal refund procedure"). Thus, the primary beneficiaries of those provisions are not tax***payers***, but, rather, the United States and its private tax ***collectors***. Thus, Petitioners fail the first prong of the *Cort* analysis.

b. Congress Intended No Private Cause of Action.

Even where specific federal rights are granted, the inquiry remains one of Congressional intent -- that is, whether Congress actually intended to create a private remedy. *See, e.g., Thompson*, 484 U.S. at 179; *Touche Ross*, 442 U.S. at 568. "[A]s with any case involving the interpretation of a statute, [the] analysis must begin with

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"implying a private right of action on the basis of congressional silence is a hazardous enterprise, at best.").

the language of the statute itself." *Touche Ross*, 442 U.S. at 568).

Here, the plain language of Section 7422 expressly bars all tax-refund suits except those brought against the Government after exhaustion of administrative remedies. *See supra* at 8-15. Section 7422 makes no exception for suits brought against collecting agents under Section 6415(c). *See AT&T*, 428 F. Supp. at 1304-06. Thus, the plain language of Section 7422 confirms that Congress intended no private remedies against collecting agents under Section 6415(c). *See* Pet. App. at 8-15; *Kaucky*, 109 F.3d at 353; *Lehman*, 930 F. Supp. at 915; *AT&T*, 428 F. Supp. at 1297. As Judge Weinfeld explained some twenty years ago, there is no indication in the scant legislative history that Congress intended a contrary result. *See AT&T*, 428 F. Supp. at 1304-05; *see also* Pet. App. at A13 ("Nothing indicates that Congress intended Section 6415(c) to create an exception to Section 7422 that would allow excise taxpayers to seek relief from the courts in the first instance."); *Kaucky*, 109 F.3d at 353 ("[T]here is no indication that Congress would have wanted the courts to entertain such suits despite the absence of express authorization."); *Lehman*, 930 F. Supp. at 914-15 (quoting with approval Judge Weinfeld's analysis of the legislative history of Sections 6415 and 7422). If anything, the modest legislative history confirms that Congress had no intention to allow refund suits against private collecting agents. *See* S. Rep. No. 1625, 89th Cong., 2d Sess. (1966), *reprinted in* 1966 U.S. Code Cong. & Admin. News 3676, 3677, 3681. Thus, Petitioners fail the second prong of the *Cort* analysis as well as the first, and their effort to recover under Section 6415(c) must be rejected.[17]

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[17]As the Court held in *Transamerica Mortgage Advisors*, 444 U.S. at 15-16, 23-34, the four *Cort* factors are not of equal weight. Where, as here, neither the statutory language nor the legislative history reveal congressional intent to create a private right of action, the judicial inquiry must end with a refusal to imply a cause of action. *Id.*; *see also Touche Ross*, 442 U.S. at 568.

c. Implying a Cause of Action Would Frustrate the Goals of Section 7422.

Petitioners also fail the third *Cort* criterion, because the private cause of action Petitioners seek would frustrate the primary goal of the tax code: the orderly administration of the federal taxes.

To ensure the efficient and orderly administration of tax-refund claims, Congress created administrative processes through which aggrieved individuals may submit tax-refund claims to the IRS. To ensure that such claims do not unduly interfere with tax collections, Congress has imposed exacting requirements on taxpayers seeking refunds, including the duty to seek administrative relief before going to court. *See* 26 U.S.C. § 7422.

By suing Southwest, a private collecting agent, Petitioners are attempting an end run around the procedural requirements Congress has enacted to ensure the efficient administration of federal taxes. If Petitioners' claims are allowed,

> [Petitioners] will have succeeded in avoiding the strict procedural requirements for obtaining refunds. In effect they will have obtained a refund of taxes from the government without giving the Internal Revenue Service an opportunity to consider their claims administratively, and without being subject to the statutes of limitations imposed by the Code. This would clearly negate the Congressional purpose in enacting the refund provisions of the Code.

AT&T, 428 F. Supp. at 1303; *see also* Pet. App. at A14-A15; *Kaucky*, 109 F.3d at 353; *Lehman*, 930 F. Supp. at 915.

Congress intended to provide through 26 U.S.C. § 7422 a fair and manageable system for adjudicating tax claims and thus established that system as the ***only*** vehicle through which judicial review of tax liability can be obtained. Not surprisingly, therefore, the courts have steadfastly enforced Congress' procedures for processing tax-refund claims. *See, e.g.*, *Snyder v. Marks*, 109 U.S. 189, 193 (1883) ("The remedy so given [by the Code] is exclusive, and

no other remedy can be substituted for it."); *Flora v. United States*, 362 U.S. 145, 176 (1960) (expressing need to protect "the harmony of our carefully structured twentieth century system of tax litigation"); *Poretto v. Usry*, 295 F.2d 499, 501 (5th Cir. 1961), *cert. denied*, 369 U.S. 810, 82 S. Ct. 687 (1962) (noting that the Code's procedural requirements are "mandatory and exclusive"). Because the cause of action Petitioners seek would undermine rather than advance Congress' goal of ensuring the orderly administration of the tax laws, Petitioners also fail the third prong of the *Cort* analysis.

d. Adequate Remedies Already Exist.

The fourth *Cort* factor asks whether implying a federal cause of action is inappropriate because another body of law, whether state or federal, already provides adequate legal remedies. As noted *supra* at 25, ample remedies already are available to Petitioners, as Congress has created in 26 U.S.C. § 7422 an administrative remedy for taxpayers and provided for judicial review once that administrative remedy has been exhausted. Where, as here, the absence of any basis for inferring an intent to create a civil cause of action appears in a statutory scheme that provides for criminal enforcement, *see* 26 U.S.C. §§ 6672 & 7202, and expressly provides administrative and judicial remedies, *see* 26 U.S.C. § 7422(a); 28 U.S.C. § 1346(a)(1), implying a civil cause of action is particularly problematic. *See Cort*, 422 U.S. at 78-79. In such a case,"it is entirely appropriate . . . to relegate [Petitioners] to whatever remedy is created by [existing] law." *Cort*, 422 U.S. at 84. Thus, Petitioners also fail the fourth *Cort* factor.[18]

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[18]In *Cort*, the existing remedies were based on state law; here, the existing remedy is federal. The principle, however, is the same: courts should not create rights of action through implication when adequate legal remedies already exist.

CONCLUSION

For the reasons stated above, the Court should deny the petition for a writ of certiorari.

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Respectfully submitted,

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